

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 25, 2009

SHELBOURNE MASON v. STATE OF TENNESSEE

Appeal from the Circuit Court for Sullivan County
No. C52,350 R. Jerry Beck, Judge

No. E2008-01402-CCA-R3-PC - Filed September 30, 2009

The petitioner, Shelbourne Mason, appeals as of right the Sullivan County Circuit Court's denial of his petition for post-conviction relief and attacks, on the grounds of ineffective assistance of counsel, his conviction of delivery of .5 grams or more of cocaine for which he received a thirty-year sentence as a career offender. Following our review, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON., P.J., and JAMES CURWOOD WITT, JR., J., joined.

Raymond C. Conkin, Jr., Kingsport, Tennessee, attorney for appellant, Shelbourne Mason.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph E. Perrin, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The petitioner was convicted by a jury of one count of delivery of .5 grams or more of cocaine, a Class B felony, and sentenced to thirty years as a career offender. On direct appeal, counsel attacked the sufficiency of the evidence to support his conviction. This court affirmed the conviction and sentence. State v. Shelbourne Mason, No. E2004-00944-CCA-R3-CD (Tenn. Crim. App. Mar. 8, 2005), app. denied (Tenn. Aug. 22, 2005). The facts of the offense relevant to the post-conviction petition are summarized that the petitioner exchanged telephone numbers with Richard Adams while both individuals were attending Sullivan County General Sessions Court proceedings on August 16, 2001. Mason, slip op. at 2. Later that evening, Adams contacted the petitioner who agreed to meet him. Id. They then traveled together to a Sullivan County housing development where the petitioner, in exchange for some sum of money, obtained more than .5 grams of cocaine for Adams. Id. Unknown to both individuals, Sergeant Timothy Crawford of the Kingsport Police

Department was assisting in surveillance of the area and promptly arrested Adams who, upon his arrest, immediately related the events of the drug buy to Sergeant Crawford. Id., slip op. at 1-2.

On August 18, 2006, the petitioner filed a pro se petition for post-conviction relief alleging the ineffective assistance of counsel at both the trial and appellate levels, the presentation by the State of perjured testimony, and a Brady violation. See Brady v. Maryland, 373 U.S. 83 (1963). Following an initial review by the post-conviction court, the post-conviction court granted the petitioner an additional fifteen days to amend the petition with the assistance of appointed counsel.¹ See Tenn. Code Ann. § 40-30-106(d). On October 4, 2007, the amended petition was filed containing allegations related to the ineffective assistance of counsel. Following a full evidentiary hearing, the post-conviction court found that the petitioner had failed to prove any allegations of ineffective assistance of counsel and denied relief on June 13, 2008. The petitioner filed a timely notice of appeal on June 24, 2008.

The proof at the evidentiary hearing consisted solely of the testimony of the petitioner and trial counsel. The petitioner testified that he asked his trial counsel to attack the validity of the indictment charging him with sale and/or delivery of cocaine on the basis of it being duplicitous; he stated that trial counsel ignored his requests. He also claimed that trial counsel was deficient in failing to investigate and present the testimony of Connie Bishop and Barbara Manis who, he asserted, would have testified that he did not sell or deliver anything to Adams on the night of the incident. The petitioner claimed that trial counsel failed to attack the admissibility of a photograph of him taken from a search of Ms. Manis' vehicle. He also asserted that trial counsel should have asked the trial court to disqualify Adams as a witness when he gave differing testimonies concerning the amount of money exchanged for the cocaine. He challenged the propriety of trial counsel's advice that the petitioner stipulate that he met Adams earlier on the day of the offense while they both attended sessions court. The petitioner claimed that the note containing a telephone number which Adams alleged the petitioner had given him during court should have been challenged because it did not, in fact, contain the petitioner's telephone number. Finally, the petitioner testified that trial counsel was ineffective for failing to impeach Sergeant Crawford's testimony that he had known the petitioner for several years prior to the offense when, according to the petitioner, that was untrue because the petitioner had spent considerable time incarcerated in the time leading up to the offense.

On cross-examination the petitioner admitted that he had spoken to Sergeant Crawford but denied being in Adams' vehicle. He also conceded that the alleged alibi witnesses, Ms. Manis and Ms. Bishop, were not present and, therefore, could not have provided him an alibi or other exculpatory testimony; the petitioner ultimately admitted that neither alleged witness had any personal knowledge of the events of the night of his arrest. The petitioner testified that he did see Adams and his girlfriend in sessions court earlier that day but denied that the note contained his

¹ Although the trial court acknowledged the memorandum of law in support of the petition for post-conviction relief which was attached to the pro se petition, the trial court nevertheless found that the petition failed to state a factual basis to support the alleged claims for relief and directed the petitioner to amend the petition pursuant to Tennessee Code Annotated section 40-30-106(d). We note that the pro se petition and accompanying memorandum, both verified under oath, contained sufficient factual allegations to present a colorable claim warranting an evidentiary hearing without further amendment.

telephone number; instead, he testified that the telephone number on the note belonged to Ms. Manis.

Trial counsel testified that he had been licensed to practice law since 1990 and that about twenty-five percent of his practice involved representing defendants in criminal court. Trial counsel testified, as reflected by his fee claim from the petitioner's case, that he consulted with the petitioner for approximately five hours leading up to the trial. He recalled discussing the duplicity of the indictment with the petitioner and stated that the petitioner chose not to pursue any pretrial attack on the indictment. He stated that, contrary to the petitioner's testimony, the note with telephone numbers was provided during pretrial discovery and that both he and the petitioner were well aware of the contents of the note. He testified that his file contained no reference to the petitioner asking him to interview Ms. Manis or Ms. Bishop. He also stated that because the petitioner never denied his presence at the scene of the offense, there was no reason to investigate or attempt to establish an alibi defense. Regarding the stipulation concerning the petitioner and Adams' meeting in sessions court, trial counsel recalled that he entered into the stipulation to prevent the disclosure to the jury of the fact that the petitioner had a case pending in that court. Trial counsel could not recall that the petitioner alerted him to any issue regarding the length of time the petitioner and Sergeant Crawford could have known one another prior to the offense. He also stated that he fully cross-examined Adams relative to his conflicting testimony of the amount of money exchanged.

Following the evidentiary hearing, the post-conviction court found that the petitioner failed to establish his claims of ineffective assistance of counsel by clear and convincing evidence. Specifically regarding the duplicity of the indictment, the post-conviction court found that:

the trial judge in this case . . . required the jury to be assured of the unanimous verdict; required the jury to state exactly what crime they found, either delivery or the sale of cocaine. Clearly [the verdict form] indicates they found the [petitioner] guilty of delivery of .5 grams or more of cocaine, a Class B felony.

So the jury was instructed. The jury returned their written judgment form. So there's no question we had a unanimous verdict, even though two crimes may have been included in a single count of the indictment.

. . . .

Because we had a unanimous verdict, because the jury picked one of the two they could have: 1) I just don't think it's error that we could say that [trial counsel] was – failed to protect the [petitioner] So I can't say it was error of a nature that [trial counsel]'s advice would be substandard; or more particularly that any prejudice arose by [trial counsel] not making the motion.

The post-conviction court further found that the petitioner's failure to present any affidavit or testimony from the two alleged witnesses, Ms. Manis and Ms. Bishop, rendered his allegation of deficient performance to be without merit. Regarding Adams' credibility in light of conflicting accounts of the money exchanged, the post-conviction court found that the issue was a jury question and was properly resolved by the jury's verdict. The post-conviction court also found that the

petitioner's allegation regarding suppression of the photograph taken from Ms. Manis' vehicle was without merit because the petitioner did not establish standing to challenge the seizure of the photograph and the allegation was "vague." The post-conviction court found that the stipulation was an appropriate action taken to insulate the jury from knowledge of the petitioner's pending charges in sessions court; as such, there was no deficient performance. The post-conviction court found no deficient performance related to the admission of the note at trial. The post-conviction court also found that the issue regarding how long Sergeant Crawford had known the petitioner was of no consequence to the outcome of the trial. In its written order, the post-conviction court additionally noted that it was reasonable not to cross-examine Sergeant Crawford regarding this aspect of his testimony in light of the petitioner's assertion that he was in prison for several years preceding this offense. In conclusion, the post-conviction court stated:

I don't see that the [petitioner]'s proved ineffective assistance of counsel on any of the issues. Further, if by some stretch of the imagination these could be considered [deficient]. . . .

The court sees no prejudice. [It w]ouldn't have made the result of the trial any different.

On appeal the petitioner asserts that trial counsel was ineffective for failing to object to the duplicitous indictment, for failing to investigate properly the facts of the case and keep the petitioner apprised of the evidence to be used against him, and for advising the petitioner to enter into the stipulation regarding general sessions court. The State responds that the post-conviction court properly denied the petition for post-conviction relief because the petitioner failed to establish any deficiency in trial counsel's representation. Following our review, we agree with the State and affirm the judgment of the post-conviction court.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been

different.” Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Regarding trial counsel’s failure to challenge pretrial the duplicitous indictment, trial counsel correctly advised the petitioner that a successful pretrial challenge to the indictment may have resulted in the State seeking an indictment on two counts of alternative theories. However, we note that had the petitioner been convicted of both counts, the two counts would have merged into one conviction. Nevertheless, the record reveals that the trial court, through its instructions, eliminated the danger of any lack of jury unanimity relative to the petitioner’s conviction. The verdict form indicating a finding of guilt of delivery of cocaine supports the post-conviction court’s findings relative to this issue. Therefore, we conclude that the evidence does not preponderate against the post-conviction court’s findings regarding this allegation; the petitioner is not entitled to relief.

Regarding the petitioner’s claim of deficient performance in the investigation of the case and pretrial preparation of the case, the petitioner maintains that trial counsel should have interviewed witnesses for a possible alibi defense and should have challenged the seizure of a photograph taken from Ms. Manis’ vehicle. The post-conviction court accredited trial counsel’s testimony that the petitioner never asked him to interview either Ms. Manis or Ms. Bishop and that the petitioner never denied his presence at the scene of Adams’ arrest. Furthermore, we note that the petitioner conceded at the evidentiary hearing that neither Ms. Manis nor Ms. Bishop had any knowledge of the offense. Regarding the cross-examination of Adams and Sergeant Crawford, we agree with the post-conviction court’s findings that trial counsel was not deficient in his handling of these matters. Likewise, we agree with the post-conviction court’s findings regarding suppression of the photograph. Therefore, we conclude that the evidence does not preponderate against the post-conviction court’s findings regarding this allegation; the petitioner is not entitled to relief.

Finally, the petitioner asserts that trial counsel should not have advised him to enter into the stipulation concerning meeting Adams in sessions court. We agree with the post-conviction court that trial counsel did not perform deficiently in his effort to shield the jury from information concerning prior unrelated charges pending in general sessions court at the time of this offense. Therefore, we again conclude that the evidence does not preponderate against the post-conviction court’s findings regarding this allegation; the petitioner is not entitled to relief.

CONCLUSION

In consideration of the foregoing, the judgment of the post-conviction court denying the petition for post-conviction relief is affirmed.

D. KELLY THOMAS, JR., JUDGE